UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

POOL BUILDERS SUPPLY OF THE CAROLINAS, INC., Plaintiff, v. THE POOL FACTORY, INC. Defendant.	Civil Action No. 3:16-cv-00800

COMPLAINT

Plaintiff Pool Builders Supply of the Carolinas, Inc. ("Plaintiff" or "PBS"), for its Complaint against Defendant The Pool Factory, Inc. ("Defendant" or "Pool Factory"), pursuant to Rules 7 and 8, Federal Rules of Civil Procedure, alleges as follows:

Nature of the Action

1. This Complaint is an action for trademark infringement and unfair competition under the Lanham Act, 15 U.S.C. §§ 1114 and 1125, for violation of the North Carolina Unfair & Deceptive Trade Practices Act, N.C.G.S. § 75-1.1, and for unfair competition and trademark infringement under applicable state law.

Parties

2. Plaintiff Pool Builders Supply of the Carolinas, Inc., is a North Carolina corporation with a principal place of business at 1124 Central Ave., Charlotte, NC 28204.

3. Upon information and belief, Defendant The Pool Factory, Inc. is a New York corporation with a principal place of business at 58 50th St., Brooklyn, NY 11232.

Jurisdiction and Venue

4. This Court has subject matter jurisdiction over this action upon the following grounds:

a. 28 U.S.C. § 1331, this being a civil action arising under the laws of the United States;

b. 28 U.S.C. § 1337(a), this being a civil action arising under an Act of Congress regulating Commerce;

c. 28 U.S.C. § 1338(a), this being a civil action arising under the trademark laws of the United States, namely, the Lanham Act, 15 U.S.C. § 1051 *et seq.*;

d. 28 U.S.C. § 1338(b), this being a civil action asserting a claim of unfair competition joined with a substantial and related claim under the trademark laws;

e. 28 U.S.C. § 1367(a), this being a civil action including claims that are so related to claims that are within the original jurisdiction of the Court that they form part of the same case or controversy under Article III of the United States Constitution.

5. This Court has personal jurisdiction over Defendant pursuant to N.C.G.A § 1-75.4 (1)(d) and / or (5)(e) by virtue of North Carolina's Long Arm Statute.

6. Venue is proper in this Court under the provisions of 28 U.S.C. §§ 1391(a), (b), and (c).

Background Facts Regarding Plaintiff and its AQUABRITE Mark

7. Since its inception in 1975, PBS has been a leading provider of swimming pools, swimming pool accessories and supplies. Over the past 40 years, PBS has grown to become a regional presence, offering to its customers throughout the Southeast, among other things, a line of chemicals for use with swimming pools, featuring chemicals to clarify water, eliminate foam, prevent and remove scale formation and staining caused by certain minerals, and remove stains (the "AQUABRITE Goods"). For nearly 30 years, PBS has offered and sold, among other

things, these AQUABRITE Goods under the mark AQUABRITE (the "AQUABRITE Mark"). PBS has used such mark continuously in connection with the AQUABRITE Goods since at least as early as August 7, 1987.

8. As part of its business, PBS sells other goods as well, including, but not limited to, pool panels, remote controls, fiber optic lighting, pool liners, pool steps and railings, and water features.

9. Over the past 25 years, PBS has promoted and advertised to the public the AQUABRITE Goods under the AQUABRITE Mark at considerable expense, expending tens of thousands of dollars annually in marketing and advertising the AQUABRITE Goods sold under the AQUABRITE Mark.

10. By reason of the adoption and the longstanding and continuous use of the AQUABRITE Mark in conjunction with the AQUABRITE Goods, the AQUABRITE Mark has acquired special and particular significance and very valuable goodwill as identifying PBS and its AQUABRITE Goods.

11. Through extensive use and recognition, PBS has acquired common law rights in the AQUABRITE Mark as a proprietary trademark, which rights extend, without limitation, to the exclusive rights to use such designation nationwide in conjunction with PBS's goods, including, without limitation, chemicals for use with swimming pools and related goods.

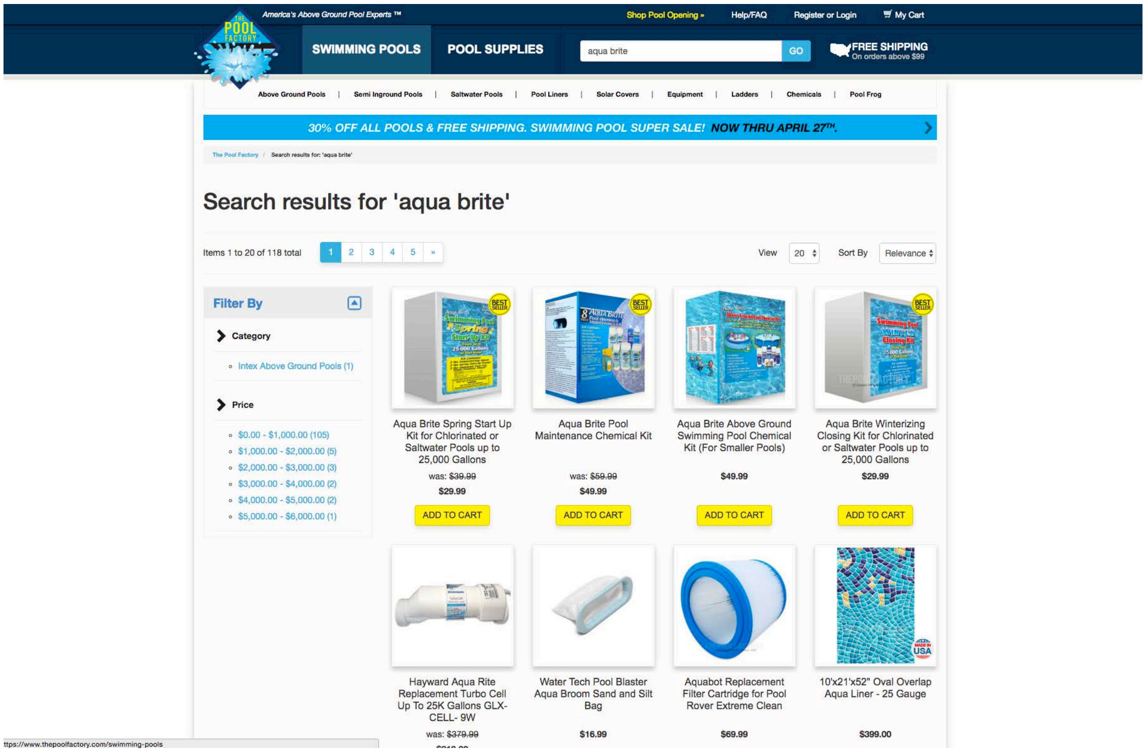
12. PBS also owns U.S. Reg. No. 4,493,364 for the AQUABRITE Mark in IC001 (chemicals for use in swimming pool water, namely, liquid clarifier; phosphate remover, chlorination additive and stabilizer; pH additive and pH decreaser; calcium enhancer); IC003 (salt cleaner and preservativie; stain preventer and remover; foam remover; metallic remover; tile and vinyl cleaner; oil, grease and scum remover); and IC005 (algaecide; algae preventer and

remover) (the "AQUABRITE Registration"). A true and correct copy of the AQUABRITE Registration is attached hereto as Exhibit A.

13. The AQUABRITE Registration constitutes prima facie evidence of its validity and conclusive evidence of PBS's exclusive right to use the AQUABRITE Mark in connection with the goods identified therein and on other commercial goods. The AQUABRITE Registration also provides constructive notice to Defendants of PBS's ownership of and exclusive rights in the AQUABRITE Mark.

Unlawful Acts of the Defendant

14. Defendant has been using reproductions, counterfeits, copies and colorable imitations of Plaintiff's registered AQUABRITE Mark in North Carolina and elsewhere in this country, in connection with swimming pool chemicals and sold under the AQUA BRITE brand (the "Infringing Designation"), including without limitation as depicted below (hereinafter, the "Infringing Goods"):



America's Above Ground Pool Experts ™
Shop Pool Opening »
Help/FAQ
Register or Login
My Cart
SWIMMING POOLS
POOL SUPPLIES
aqua brite
GO
FREE SHIPPING
On orders above $99
Above Ground Pools | Semi Inground Pools | Saltwater Pools | Pool Liners | Solar Covers | Equipment | Ladders | Chemicals | Pool Frog
30% OFF ALL POOLS & FREE SHIPPING. SWIMMING POOL SUPER SALE! NOW THRU APRIL 27TH.
Search results for 'aqua brite'
Items 1 to 20 of 118 total
View 20
Sort By Relevance
Filter By
Category
Intex Above Ground Pools (1)
Price
$0.00 - $1,000.00 (105)
$1,000.00 - $2,000.00 (5)
$2,000.00 - $3,000.00 (3)
$3,000.00 - $4,000.00 (2)
$4,000.00 - $5,000.00 (2)
$5,000.00 - $6,000.00 (1)
Aqua Brite Spring Start Up Kit for Chlorinated or Saltwater Pools up to 25,000 Gallons
was: $39.99
$29.99
ADD TO CART
Aqua Brite Pool Maintenance Chemical Kit
was: $59.99
$49.99
ADD TO CART
Aqua Brite Above Ground Swimming Pool Chemical Kit (For Smaller Pools)
$49.99
ADD TO CART
Aqua Brite Winterizing Closing Kit for Chlorinated or Saltwater Pools up to 25,000 Gallons
$29.99
ADD TO CART
Hayward Aqua Rite Replacement Turbo Cell Up To 25K Gallons GLX-CELL- 9W
was: $379.99
Water Tech Pool Blaster Aqua Broom Sand and Silt Bag
$16.99
Aquabot Replacement Filter Cartridge for Pool Rover Extreme Clean
$69.99
10'x21'x52" Oval Overlap Aqua Liner - 25 Gauge
$399.00

15. In April 2016, PBS became aware that Defendant was marketing, advertising, offering for sale, selling and distributing pool chemicals under the AQUA BRITE brand. Counsel for PBS wrote to Defendant immediately, informing them of PBS's rights, and demanding that they cease and desist from their infringing activities. Attached as Exhibit B hereto is a true and correct copy of the letter that was sent to Defendant.

16. In response to that letter, on May 18, 2016, Counsel for Defendant responded and indicated that Defendant would immediately cease and desist from the "packaging/sale/distribution/advertising of any products that contain the term(s) 'AQUA BRITE', or any variation thereof." Attached as Exhibit C is a true and correct copy of the letter sent from Counsel for Defendant to Counsel for Plaintiff on May 18, 2016.

17. Satisfied with these commitments, and seeing that Defendant's website had been changed to remove the AQUA BRITE legend, PBS took no further action at that time, but continued to monitor Defendant for compliance.

18. In early November 2016, PBS became aware that Defendant was again unlawfully using the Infringing Designation in connection with the packaging, sale, distribution, advertising and possibly manufacture of pool chemicals. PBS engaged Vaudra Ltd., a brand protection company, to investigate further.

19. As detailed in the Affidavit of Matthew Hewlett, attached hereto as Exhibit D, Mr. Hewlett accessed Defendant's website, and purchased an "AQUA BRITE Swimming Pool Winter Closing Kit" (the "Winter Pool Chemical Kit") and a "Swimming Pool Spring Start-Up Kit" (the "Spring Pool Chemical Kit"). Exhibit D, ¶¶ 3-4, Attachments 1 and 2. These Infringing Goods were shipped to and received at a North Carolina address. *Id.*

20. The Winter Pool Chemical Kit was advertised for sale by Defendant using the Infringing Designation. Exhibit D, Attachment 1. The Spring Pool Chemical Kit was packaged, sold and distributed by Defendant under the Infringing Designation. Exhibit D, Attachment 7.

21. Defendant's use of the Infringing Designation in advertising, selling, distributing and packaging the Infringing Goods is a spurious mark that is identical with, or substantially indistinguishable from, Plaintiff's registered AQUABRITE Mark and is done in a manner which is likely to cause confusion, to cause mistake and to deceive consumers and potential consumers and with the intent to infringe Plaintiff's rights.

22. The Infringing Goods advertised, sold and distributed by Defendant are identical or substantially similar to the goods in connection with which Plaintiff has registered its AQUABRITE Mark.

23. Defendant's use of the Infringing Designation on the Infringing Goods is without license, consent, authorization, or permission from Plaintiff.

24. On information and belief, the significant majority of Defendant's clientele is comprised of retail consumers. Plaintiff's AQUABRITE Mark also is targeted predominantly to retail consumers, such that the Defendant's use in that market channel enhances the likelihood of confusion.

25. By marketing, advertising, offering for sale, selling, and distributing the Infringing Goods, and continuing to do so despite being put on actual notice of PBS's rights, the Defendant intentionally has violated Plaintiff's rights in and to the AQUABRITE Mark and the related registration, and with the knowledge and intention that the use in commerce would cause, and is causing, confusion, mistake, and deception among consumers and potential consumers.

26. By knowingly and intentionally using a counterfeit of the AQUABRITE Registration in connection with the sale, offering for sale, distribution and advertising of pool chemicals, which use is likely to cause confusion, mistake or to deceive, Defendant has caused, and is causing, confusion, mistake, and deception among consumers and potential customers.

27. Defendant also, in connection with the marketing, advertising, offering for sale, sale, and distribution of the Infringing Goods, has caused, is causing, and is likely to cause confusion and mistake, and has deceived, and is likely to deceive, as to the affiliation, connection, and association of the Defendant with Plaintiff, and as to the origin, sponsorship, and approval of the Defendant's goods.

Count I:
Infringement of Registered Mark, 15 U.S.C. § 1114

28. Plaintiff incorporates by reference paragraphs 1– 27 above as if fully set forth herein.

29. The acts of the Defendant complained of herein constitute trademark infringement of a mark registered under the Lanham Act, 15 U.S.C. § 1114.

30. Plaintiff has been damaged by the acts of the Defendant complained of herein.

Count II:
Counterfeiting, 15 U.S.C. § 1114(1)(a)

31. Plaintiff incorporates by reference paragraphs 1–27 above as if fully set forth herein.

32. The acts of the Defendant complained of herein constitute counterfeiting of a mark registered under the Lanham Act, 15 U.S.C. § 1114(a)(1).

33. Plaintiff has been damaged by the acts of the Defendant complained of herein.

Count II:
Unfair Competition, 15 U.S.C. § 1125(a)(1)(A)

34. Plaintiff incorporates by reference paragraphs 1–27 above as if fully set forth herein.

35. The acts of the Defendant complained of herein constitute unfair competition under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A).

36. Plaintiff has been damaged by the acts of the Defendant complained of herein.

Count III:
Unfair & Deceptive Trade Practices, N.C.G.S. § 75-1.1 *et seq.*

37. Plaintiff incorporates by reference paragraphs 1–27 above as if fully set forth herein.

38. The acts of the Defendant complained of herein constitute unfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce, which proximately have caused actual injury to Plaintiff and its business in this State and elsewhere.

39. The acts of the Defendant complained of herein have had the tendency to deceive and mislead consumers and created a likelihood of deception with respect to the Defendant's Infringing Goods, and were performed willfully, wantonly, with the intent to harm Plaintiff and its rights in the registered AQUABRITE Mark, and with the intent to compete unfairly with Plaintiff, and in bad faith.

40. Plaintiff has been damaged by the acts of the Defendant complained of herein.

Count IV:
Common Law Unfair Competition and Trademark Infringement

41. Plaintiff incorporates by reference paragraphs 1–27 above as if fully set forth herein.

42. The acts of the Defendant complained of herein constitute unfair competition and trademark infringement of a mark entitled to protection under common law.

43. Plaintiff has been damaged by the acts of each of the Defendant complained of herein.

Prayer for Relief

WHEREFORE, Plaintiff requests that the Court:

(a) Permanently enjoin the Defendant from infringing, contributing to the infringement by others, or inducing infringement of Plaintiff's registered AQUABRITE Mark;

(b) Permanently enjoin the Defendant from unfairly competing, contributing to the unfair competition by others, or inducing unfair competition with Plaintiff;

(c) Award Plaintiff all monetary remedies to which it is entitled under the Lanham Act, the North Carolina Unfair & Deceptive Trade Practices Act, and state law, including, without limitation, any and all profits realized by the Defendant, any and all profits realized by any party with regard to whom the Defendant have contributed to or induced infringement or unfair competition, any damages sustained by Plaintiff, statutory damages to be elected by Plaintiff, treble, enhanced and punitive damages available under North Carolina and federal law, and Plaintiff's costs and attorney's fees, pursuant to 15 U.S.C. § 1117 and N.C.G.S. 75-1.1 *et seq.*;

(d) Order the destruction of Defendant's products bearing the Infringing Designation, including the Infringing Goods, and all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of Defendant, and all plates, molds, matrices, and other means of making the same, pursuant to 15 U.S.C. § 1118; and

(e) For such other and further relief as the Court deems just and reasonable.

Plaintiff demands a jury trial on all issues so triable.

Dated: November 21, 2016

s/ Megan E. Sorokes
Jason M. Sneed, Esq. (NC Bar No. 29593)
Megan E. Sorokes, Esq. (NC Bar No. 38525)

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